

McDOUGAL • LOVE • ECKIS • SMITH • BOEHMER & FOLEY

ATTORNEYS AT LAW

A Professional Corporation

460 North Magnolia, Drawer 1466

El Cajon, California 92022-1466

(619) 440-4444

FAX (619) 440-4907

Lynn R. McDougal
S. Michael Love*
Stephen M. Eckis
Tamara A. Smith
Steven E. Boehmer
Morgan L. Foley
James P. Lough
Jennifer M. Lyon

Anthony J. Boucek
Carolyn R. Brock**
Laura O. Del Valle
Heather L. Milligan
Behnaz Tashakorian
Lisa A. Foster
Johanna N. Canlas

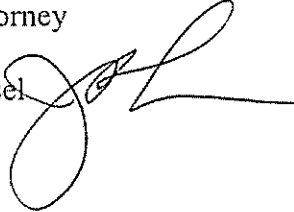
*Certified Legal Specialist, Family Law
State Bar of California Board of Legal Specialization

**Certified Legal Specialist,
Estate Planning, Trust & Probate Law
State Bar of California Board of Legal Specialization

OF COUNSEL:
LeRoy W. Knutson, A.P.C.

MEMORANDUM

TO: Members of the Citizen's Committee
Ronald Ball, Carlsbad City Attorney

FROM: James P. Lough, Special Counsel 

DATE: June 19, 2006

SUBJECT: Carlsbad Open Space Initiatives

A. Initiative Provisions

The purpose of this memo is to provide a procedural and legal background of the three Initiatives to be considered by the City Council (*hereinafter referred to as* "Initiatives" or "Measures"). The Save the Strawberry and Flower-growing Fields Act of 2006 Initiative has been circulated within the City of Carlsbad and, as of the date of the preparation of this memo, has been submitted for verification of signatures. The Committee is also reviewing a potential Council-sponsored Measure and another measure being circulated. This report is prepared to assist the Citizen's Committee when they advise the Council on its options related to the above-referenced Initiatives.

Under Elections Code section 9215, the Council may submit a proposal that contains enough signatures to the voters¹. The Council could also adopt the ordinance without change. Finally, if the Council feels that all or part of the Measure is illegal, there are a variety of methods by which the Council could establish the validity of the measure through judicial means.

¹ All code references will be to the California Elections Code unless otherwise designated.

1. Standards Applicable to Initiatives

The initiative power for cities is found in the Constitution. (Cal. Const. Art. II, Section 11.) It is a power reserved by the people rather than one granted by the Constitution. This reserved power places an initiative's proponents on an equal footing with the legislative body (City Council). With this right comes responsibility. Initiatives are subject to the same rules and conditions applicable to city councils when they adopt laws, excluding certain public hearing and procedural requirements. As a city council must comply with statutory requirements, a citizen-sponsored initiative must also generally meet statutory standards. (*Creighton v. Reviczky* (1985) 171 Cal. App. 3d 1225.)

The Initiative must also follow the California Coastal Act. (Public Resources Code Section 30000 *et. seq.*) Each coastal city must prepare a local coastal program. The General Plan sections being amended are part of the Land Use Plan ("LUP") of the Carlsbad Local Coastal Program ("LCP"). (Public Resources Code Section 30511.) These portions of the LUP may be subject to the initiative process. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763; *Yost v. Thomas* (1984) 36 Cal.3d 561.) However, as an amendment to the LCP and its implementing ordinances (LUP), the amendment takes effect only upon certification by the Coastal Commission. (Public Resources Code Section 30514(a); *Yost v. Thomas* (1984) 36 Cal.3d 561; 70 Cal. Op. Atty. Gen. 220 (1987).) The effective date discussions below must be viewed with this requirement in mind.

2. Current Land Use Setting

Currently, the General Plan intends to have a natural urbanization process take place. As an example, the Land Use Element discusses the agricultural transition as follows:

5. Agriculture. Agriculture is an important resource in Carlsbad. The City's agricultural policies are intended to support agricultural activities while planning for the future transition of the land to more urban uses consistent with the policies of the General Plan and the Carlsbad Local Coastal Program (LCP).

The City's LCP protects agricultural lands from the premature conversion to more urban land uses by establishing programs which require mitigation for conversion of agricultural property to urban uses. It also has established methods to benefit agriculture in the community by providing financial assistance through cash programs.

While the City encourages agriculture, it recognizes the potential problems associated with agricultural land use. For example, to prevent the destruction of sensitive wild and archeological resources, clearing and grubbing of natural areas for agriculture requires a permit and environmental review. Also, the City encourages conservation techniques in agricultural activities to reduce soil

erosion and water usage. (Carlsbad General Plan, Land Use Element, II(D)(5), Amended September 13, 2005.)

The Land Use Plans of the City, within the Coastal zone, must be consistent with the Coastal Act. The Coastal Act includes a priority for visitor-serving uses close to the coast. (Public resources Code Section 30255.) This requirement states as follows:

Coastal-dependent developments shall have priority over other developments on or near the shoreline. Except as provided elsewhere in this division, coastal-dependent developments shall not be sited in a wetland. When appropriate, coastal-related developments should be accommodated within reasonable proximity to the coastal-dependent uses they support.

Without Coastal Commission approval, the portions of an Initiative inconsistent with the LCP will not take effect. The Commission could prevent implementation of those portions of the covered properties that are inconsistent with the LCP/LUP.

B. Initiative Law and Land Use

Land Use Initiatives are subject to statutory and judicially interpreted rules of construction. They must be:

1. Consistent with the General Plan;
2. If they amend the General Plan, they must not create an internal inconsistency within the various elements of the General Plan;
3. They must not preempt State regulatory authority held by the Coastal Commission, Public Utilities Commission, California Energy Commission or other applicable state bodies²;
4. They cannot direct future legislative discretion of the City Council; and
5. They must comply with many of the same rules governing City Council except basic procedural rules applicable only in a legislative setting.

The three measures can only be implemented to the extent they meet the requirements listed above. All three are General Plan amendments. The relationship between the General Plan changes in each measure and underlying zoning has been addressed in other Committee materials.

² The State Agencies with regulatory authority would include the California Coastal Commission (Coastal Act), California Energy Commission (Power Plant Siting and Regulatory Issues), Public Utilities Commission (Utility Company regulations, including use of right-of-ways), Department of Pesticide Regulation (Agricultural use of Pesticides), Department of Fish & Game (Plant and wildlife issues) and the San Diego Regional Water Quality Control Board (Stormwater runoff and pollution control). Other agencies may have regulatory authority, but these Agencies are the ones that would be the most directly involved.

C. Analysis of Procedural Sections of the Strawberry Fields and City Initiatives

This office has reviewed various provisions of the Strawberry Fields Initiative that is currently being reviewed by the Registrar's Office to see if it qualifies for the ballot. This Measure is illustrative of many of the legal issues raised when restricting land use authority for a small number of parcels also contained in the City's Initiative. The Carlsbad Gateway Parkland and Open Space Initiative of 2006, which primarily requires a study program without imposing any specific zoning restrictions, does not raise the same serious legal issues as the other two measures. For that reason, the following sections discuss the some of the legal issues surrounding the Strawberry Fields and City measures.

1. Effective Date of the Strawberry Fields Initiative

Under Section 4 of the Strawberry Fields Initiative, the effective date is established as January 1 of the year following adoption by the voters. Under 9217, the effective date of an Initiative is ten days after the City Council certifies the result of the election. This section states as follows:

If a majority of the voters voting on a proposed ordinance vote in its favor, the ordinance shall become a valid and binding ordinance of the city. The ordinance shall be considered as adopted upon the date that the vote is declared by the legislative body, and shall go into effect 10 days after that date. No ordinance that is either proposed by initiative petition and adopted by the vote of the legislative body of the city without submission to the voters, or adopted by the voters, shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance.

The effective date of the Ordinance conflicts with the effective date for local municipal ballot measures established by the Legislature. The date listed in the elections code would control. In addition to establishing a general effective date, the initiative also attempts to be applied retroactively to December 19, 2005.

This retroactive provision has two legal impacts. First, it attempts to prohibit any land use amendment after December 19, 2005. It also directs the City to amend the General Plan and related plans and ordinances to make them consistent with this initiative.

The retroactive nature of this measure creates legal issues that will have to be considered by the City Council if the voters approve it. The retroactive provisions may affect vested rights or invalidate previously adopted Council approvals. This issue needs to be reviewed prior to

either adoption by the Council or placement on the ballot to give the landowners and the public an understanding of the impact of the measure on existing land use approvals

2. Council Initiative Amendments in the Strawberry Fields and City Measures.

Under Section Five, the Strawberry Fields Measure states as follows:

Permits amendment of this Initiative by the City Council without a vote of the people in certain circumstances to comply with any state mandated programs, that results in a violation of the Constitutional Rights of any person or entity or to disturb a vested right under state or local law

The City Council can "amend" the Initiative for three reasons; "state mandates," deprivation of Constitutional rights and to preserve "vested rights". The amendment scenario will more than likely come up on a project-by-project basis where application of the Initiative violates one of these conditions. It is recommended that the City monitor potential legislation in these areas if the Initiative is adopted and implemented.

The City measure contains similar language. The main difference is the potential use of a dispute resolution process under City Initiative Section 7.3 to handle takings issues. This helps, but does not eliminate, the procedural problems faced by the City in dealing with a potential taking.

a. State Mandate Issues.

The "state mandate" issue will require monitoring of two primary areas of regulation, housing law and environmental law. The State is currently in the midst of a housing crisis and legislation to address this issue is a regular issue in Sacramento. The impacts of fair share housing laws and possible expansion of developer-driven incentive programs are the most likely future legislative impacts that may affect this Measure's goal of a permanent agricultural zone and the desire of both measures (City and Strawberry Fields) to prohibit housing in this area.

b. Constitutional Issues Requiring Amendments.

Both the Strawberry Fields and City Initiative allow Council amendments to prevent deprivations of Constitutional rights. These issues usually come up on an *ad hoc* basis with the filing of a meaningful application for a development permit. (*MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348; *Williamson County v. Hamilton Bank* (1985) 473 U.S. 172, 186, 190 n.11; *Southern Pacific Transportation Company v. City of Los Angeles* (9th Cir. 1990) 922 F.2d 498; *Shelter Creek Development Corp. v. City of Oxnard* (9th Cir. 1988) 838 F.2d 375, 377; *Herrington v. Sonoma County* (9th Cir. 1987) 834 F.2d 1288, 1494.) The City Council will be required to make a determination whether a "taking" has occurred under the Fifth Amendment to the United States Constitution and under the California Constitution if it denies the project proposal.

The standard that the courts use is not easily transferred to a public hearing setting before the City Council. It is likely that the main argument for any non-agricultural proposal will be that the property values have diminished to such an extent that there is no longer a reasonable use left for the property without the development proposal. The three factors that the courts look at on a case-by-case basis are:

1. The economic impact of the regulation;
2. The owners' reasonable investment backed expectations; and
3. The character of the government action.

Of these three factors, economic impact is the most important. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015, 1027; *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987) 480 U.S. 470, 485.) In *Keystone*, the Court looked at the value that was left after the regulation.

The Strawberry Fields Initiative leaves the decision of whether a Constitutional deprivation occurs to the City Council. The Council would have to expand its normal level of land use review to include a review of economic factors. In addition to reviewing the wisdom of the development from a public policy perspective, the City Council would have to determine whether the Initiative deprives the landowner of "economically viable use."

The City Council would need to do an economic analysis of the proposal to determine "economic viability." This would necessitate the hiring of experts to assist staff in evaluating a proposal and the impact of the Initiative on the parcel's remaining viability if the proposal is rejected. This would turn the City Council into a quasi-judicial body weighing evidence of a Constitutional deprivation. Staff information provided to the Council at the hearing regarding financial factors would be absolutely crucial to building a record regardless of the result.

The City Council will have to weigh evidence, as a Court would normally do, to determine if the Constitutional standard is met. If the City Council approves the development proposal, a citizen's suit to overturn the decision would, if successful, possibly result in the award of attorney's fees. (Cal. Code of Civil Procedure Section 1021.5.) If the landowner succeeds in overturning a denial of the proposal, the landowner could receive attorney's fees and damages for the loss in value. (42 United States Code Section 1988; *Agins v. City of Tiburon* (1980) 447 U.S. 225; *Penn. Cent. Transp. Co. v. New York City* (1978) 438 U.S. 104.)

The City Council may wish to consider several options to determine how to handle these issues. One step may be to set up a special public hearing process to take into account the technical factors that need to be considered. This process could include the adoption of an ordinance that sets up a procedure by which the Council would hear the matter. Testimony could be taken from experts for the landowner, city staff and any other interested group prior to general public testimony. Specific findings could be established that mirror the Constitutional standards and the Council could set financial thresholds ahead of time (*i.e.* a range of the level of

diminution in value required to allow development for non-agricultural enterprises) to give all parties foreknowledge of the standards they would have to meet. The Council may also want to consider hiring a Special Master (*i.e. a retired federal judge*) to make a recommendation to the Council after conducting an investigation on any application. The City Council-sponsored Initiative includes this element under Section 7.3.

c. Vested Rights.

The "vested rights" exception under state or local law would entail the City Council implementing the common law and statutory standards regarding the application of new rules. The City Initiative, under 7.2, also includes this caveat by implication. This provision would implement two state "vested rights" laws, vesting tentative subdivision maps (Government Code Sections 66498.1-66498.9) and development agreements Government Code Sections 65864-65869). There are also common law rules regarding "vested rights." (*Avco Community Developers, Inc. v. South Coast Reg'l. Comm.* (1976) 17 Cal.3d 785, 791.) The common law rules require the landowner to proceed with a project where they have "performed substantial work and incurred substantial liabilities in good faith reliance" on a validly issued permit. (*Id.*)

B. Federal Voting Rights Issues.

Of the two Citizen-circulated Initiatives, both have only been circulated in the English language. This raises questions about the validity of the Measure under the Federal Voting Rights Act of 1965. (42 United States Code Sections 1973 *et. seq.*) Currently, the County of San Diego is subject to a Consent Decree and a voluntary agreement, which imposes certain ballot language requirements within the County. This includes a Spanish language requirement on "voting materials." There are two questions that need to be answered. First, is this requirement applicable to the City of Carlsbad? Second, does it preclude the circulation of a City Initiative measure?

Under regulations adopted by the United States Department of Justice, the coverage of the provisions of the Voting Rights Act extend to Cities within a County subject to Voting Rights requirements. Where a political subdivision (*e.g., a county*) is determined to be subject to certain sections in the Act, all political units that hold elections within that political subdivision (*e.g., cities, school districts*) are subject to the same requirements as the political subdivision. (28 Code of Federal Regulations Chapter 1, Part 55.9 (July 1, 1999 Edition))

This section would seem to require application of the Voting Rights Spanish language provisions to the City through the County. Under a recent decision, the County Registrar of voters advised Cities in San Diego County of their potential obligations under the Voting Rights Act. Once this issue came to the attention of the Carlsbad City Attorney, the concern was passed along to the Circulators of the first Initiative during its circulation period.

This issue arose based on a decision of a three Judge panel of the Federal Ninth Circuit Court of Appeals. (*Padilla v. Lever* (9th Cir. 2005) 429 F.3d 910, withdrawn No. 03-56259,

April 28, 2006.) This decision, subsequently withdrawn, applied a translation requirement to the circulation of a recall petition. The recall petition was considered a "voting material" subject to the Voting Rights Act translation requirements. Since recall petitions do not require City review prior to circulation as an Initiative petition does, the application of the *Padilla* decision would certainly follow. (9203.)

With the withdrawal of the *Padilla* opinion, the Ninth Circuit will hear the issue *en banc*, before a full panel of judges. Until a decision is reached, the law is in a state of flux. Case law from other Federal Judicial Circuits sheds some light on the subject, but does not definitively answer the question of the application to these Initiatives.

The 10th and 11th Federal Circuit Courts have both ruled that "other voting materials or information relating to the electoral process" does not include initiative petitions. (42 United States Code Section 1973aa-1a(c) (Section 203); *Montero v. Meyer* (10th Cir. 1988) 861 F.2d 603; *Delgado v. Smith* (11th Cir. 1988) 861 F.2d 1489.) Ultimately, the Ninth Circuit will decide if the language of Section 203 of the Voting Rights Acts extends to this Initiative measure. When the *en banc* panel issues its decision, it may give some guidance to application of this requirement for the jurisdictions within the Ninth Circuit.

C. S.D.G. & E. QUESTIONS

The Committee received a series of questions from SDG&E, dated June 13, 2006, regarding the legal impacts of the Strawberry Fields and City measures. Generally, these questions represent an understanding of the Initiatives that is consistent with the presentation given to the Committee on June 15, 2006. The Measures appear to not be unconstitutional, on their face, under the "takings" clause of the Constitution. However, questions, in general, raise the issue of future takings as the rules are applied to individual situations ("as applied" Constitutional violations).

1. Improper Motive of the Initiative Proponents. The question relates to the motives of the backers of the Strawberry Fields Initiative. Normally, the motives of a Legislator cannot be used to invalidate a legislative enactment. Normally, legislation can only be found invalid based on the actual language of the enactment, not the motivating factors behind its adoption. While there are cases and situations where improper motives have invalidated legislation, we are not aware of a case or circumstance where a City is required to investigate the motivations behind an Initiative supporter.
2. Fair Share Housing Issue. This question deals with the impact of the measures on the City's regional "fair share" housing requirements. Currently, none of the parcels are zoned for housing development. The Gateway measure is the only one with the possibility of housing. The City's housing obligation is not limited to one parcel or group of parcels. As stated above, the State

Legislature may impose housing laws which may affect parcels covered by these Measures, but have not done so at this time.

3. Spot Zoning. The issue of "spot zoning" relates to the improper adoption of a zoning restriction that only targets a small area of the community for arbitrary treatment not applied to neighboring parcels. For the most part, this argument would depend on a variety of factors. One factor that argues against "spot zoning" is the fact that the parcels were already subject to the "agricultural" and "open space" zoning called for in the Strawberry Fields and City Initiatives. The difference is the permanency of the restrictions, not their initial application. Spot zoning may be a problem in the future as the rest of the City develops, but it is not a serious legal concern at this time considering the existing rules.
4. Depressing Land Value For Later Acquisition. The argument being made is that the two Initiatives amount to unreasonable pre-condemnation conduct. (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39.) A City cannot use its zoning power to depress the price of property prior to condemning it. Evidence of improper pre-condemnation conduct could result damages against the City for trying to acquire the property at less than the fair market value. This office is not aware of any such conduct.
5. Regional Welfare. This question is more of a political or policy question related to the appropriate land use for the parcels subject to the two Initiative measures.
6. Taking Issue. This question assumes several facts that lead to the conclusion that a "taking" will occur if the Strawberry Fields or City Initiatives are adopted. The discussion above and the discussion at the meeting of June 15th cover the standards applicable to the scenario raised. The utility company would have to seek a change in land use with a meaningful application presented before the City. The Council would have to determine if a "taking" would occur, given the facts that are presented at the public hearing.
7. Lack of Agricultural Policy. This question attempts to point out an unfair burden placed on the subject properties to preserve agricultural lands. The premise of the question states that the City has no plan for agriculture. However, as pointed out in Section A(2) above, the City's General Plan recognizes the continued existence of agricultural uses on these parcels. The difference the two Initiatives have with the current policy is making these restrictions permanent. Since Courts are usually deferential to the public policy choices of Cities, the question will still probably come down to a "takings" analysis.
8. Public Utility Commission Preemption. This question relates to the discussion above of the preeminent authority of the Public Utility Commission over public utilities. As discussed in Section B above, the City's laws, including those imposed by initiative cannot preempt state law. (*Committee of Seven Thousand v. City of Irvine* 1988) 45 Cal.3d 491.) To the extent that actual restrictions in the two Initiatives conflict with a specific PUC General

Order, law or regulation, those portions of the applicable Initiative measure would be invalid.

9. Impact on Utility Ratepayers. This argument discusses the public policy argument that the Measures create an unreasonable burden on public utility ratepayers. This argument is essentially a policy argument and not a legal argument.
10. Illegal Control of Future Legislative Acts. This question focuses on two specific sections in the Strawberry Fields Initiative, Sections 3.4 and 3.14 do not amend the General Plan, but require the City Council to make amendments in the future to be consistent with the Initiative measure. The language in the initiative measure creates several situations in which the Council must amend language in the General Plan, Zoning Code and specific plans for the City. The measure redefines "Coastal Agriculture" and eliminates the General Plan policy, found in various Elements, by eliminating the transition to a more urbanized landscape. Under section 3, No. 4 requires that the Vision, Introduction, Land Use, Open Space and Conservation Elements be amended in an unspecified manner to adopt the following policy:

Eliminate the presumption that agricultural policies are intended to support agricultural activities while planning for possible future transition to more urban uses and instead establishes coastal agriculture in the vicinity of Agua Hedionda Lagoon and its connection Flower Fields as preserving special conservation measures as continued coastal agricultural production.

This section is typical of the substantive provisions of the Initiative. It mandates that various elements of the General Plan be amended without specific language being targeted or referenced. This act of amending the General Plan in various undefined locations will also require the City Council to amend inconsistent zoning ordinances, specific plans and other City policies including the Local Coastal Plan's land use plan.

This method of amendment raises questions as to whether or not the initiative unlawfully controls future legislative acts. (*Marblehead v. City of San Clemente* (1991) 226 Cal. App. 3d 1504.) In *Marblehead*, a land use initiative was invalidated for directing the City Council to amend various portions of a general plan and zoning ordinance to comply with the general concepts in the initiative.

Since the *Marblehead* decision, a San Diego county case was decided which deals with language that amended a general plan with direction to amend certain sections of the County's plans and policies (*Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal. App. 4th 565.) In the *Pala* case, the initiative amended various portions of the general plan and directed the County to "make all necessary amendments to ordinances, rules and regulations, General Plan, sub-regional and community plans, and the Zoning Ordinance." (*Pala Band of Mission Indians v. Board of Supervisors*, at p.

572.) In upholding the initiative, the Fourth District Court of Appeals addressed the requirement that the Board of Supervisors amend certain laws to comply with the initiative as follows:

Sections 7C and 7D merely tell the County to enact any necessary amendments to ensure the General Plan amendment will take place. Such enabling legislation promotes, rather than violates, the requirement that a General Plan reflect an integrated and consistent document. Further, on this record, there is no basis to believe that any amendment to the General Plan would be necessary since there is no evidence Proposition C creates an inconsistency in the plan. (54 Cal. App. 4th at p. 577.)

Here, the initiative measure requires future legislative steps to be taken. The measure amends three separate elements of the General Plan that primarily deal with land use issues. It also changes the vision of the City's General Plan.

The *Marblehead* and *Pala* cases seem to conflict. In *Marblehead*, one distinction was that the City Council was directed to make the changes proposed by the measure. The San Clemente measure (*Marblehead*) did not specifically state that the General Plan was amended by the Initiative. It directed the City Council to take that step. In the *Pala* case, the Initiative did state that it was amending the General Plan, but went on to direct further amendments of the General Plan and lesser policies and laws. This distinction is one of degree and this Initiative seems to fit closer to the *Pala* model. The Strawberry Fields Initiative contains directions to the City Council to enact new laws consistent with a general policy direction. Here, the City Council is required to take a number of steps to prevent this Initiative from violating certain legal requirements. Those steps would be necessary to implement the Measure and, if the *Pala* model were followed, the Measure would not illegally bind future City Councils.

D. CONCLUSION

The three Initiatives each contain many unique legal and procedural issues. The conclusions contained in this memo are preliminary and are based on our understanding of the law at this time. With regard to the questions raised by the utility company, many of the issues will be dependent on factors that are currently in dispute. In particular, the "takings" issues will depend on a variety of future factors that may impact the ultimate result. This memo has attempted to address these questions in the time frame necessary for the Committee to meet its deadlines. Further analysis is necessary for a more definitive response on a number of the issues addressed. Many of the issues raised by the Committee and the utility may only be answered over time. Our office will be available for questions and further responses.